

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GEORGE KANELLOPOULOS	:	DETERMINATION
	:	DTA NO. 818488
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period March 1, 1997 through August 31, 1999.	:	

Petitioner, George Kanellopoulos, 203-09 28th Avenue, Bayside, New York 11360, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1997 through August 31, 1999.

A small claims hearing was held before Timothy J. Alston, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on April 2, 2002, at 9:15 A.M., which date began the three-month period for the issuance of this determination. Petitioner appeared *pro se* and by his son, Konstantino Kanellopoulos. The Division of Taxation appeared by Barbara G. Billet, Esq. (Maria C. Flores).

ISSUE

Whether petitioner has shown errors in the results of the Division of Taxation's audit of petitioner's coffee shop.

FINDINGS OF FACT

1. On February 22, 2000, following an audit, the Division of Taxation ("Division") issued to petitioner, George Kanellopoulos, a Notice of Determination asserting additional sales and use

taxes due in the amount of \$3,982.93, plus penalty and interest, for the period March 1, 1997 through August 31, 1999.

2. The Division conducted an audit of Kostathan Deli, Inc., which owned and operated a coffee shop called George's Deli at 36-27 164th Street, Flushing, New York. George's Deli was located next to a Long Island Rail Road Station. Given this location, most of the corporation's business consisted of sales to commuters of coffee, newspapers, cigarettes, candy, and small food items, such as breakfast sandwiches. In 1995 and 1996 the corporation made renovations to the premises in an attempt to expand its food sales. Such renovations were unsuccessful, however, as food sales did not improve. This failure, along with a changing neighborhood, led petitioner to close George's Deli in June 2000.

3. Petitioner was president of Kostathan Deli, Inc. He operated the business on a daily basis; handled the money and made bank deposits; and signed and prepared the corporation's sales tax returns. He did not dispute that he was a responsible officer of the corporation.

4. On audit, the Division reviewed the corporation's books and records. The corporation did not maintain source documents of sales, such as cash register tapes or guest checks, and did not maintain source documents of purchases, such as purchase invoices. Also bank statements were not made available to the auditor. The Division thus determined that the corporation's books and records were inadequate for the purpose of verifying taxable sales and decided to calculate the corporation's sales tax liability using an indirect or estimated method.

5. In its calculation of the corporation's taxable sales, the Division accepted gross sales as reported on the corporation's filed sales tax returns for the audit period because such reported gross sales were in substantial compliance with gross sales as reported on the corporation's Federal income tax returns. The corporation did not file a sales tax return for the quarter ended

February 28, 1998. For that quarter the Division estimated gross sales by taking the average of reported quarterly gross sales for the other nine quarters of the audit period. The Division thus determined audited gross sales of \$88,293.00 for the audit period. Next the Division applied a taxable percentage of 80% to audited gross sales to reach audited taxable sales of \$70,635.00. The corporation had reported taxable sales of \$22,357.00. The Division thus determined additional taxable sales of \$48,278.00 with tax due thereon of \$3,982.93.

6. The 80% taxable percentage figure used by the Division to determine taxable sales was based on the result of a prior audit of the corporation and upon the results of audits of similar businesses. The period of the prior audit was June 1, 1994 through February 28, 1997. Similar to the audit at issue in this case, in the prior audit the corporation failed to maintain source documents of sales, such as cash register tapes or guest checks. Also similar to this case, in the prior audit the Division accepted the corporation's reported gross sales and applied a taxable percentage of 80% to such reported gross sales to reach audited taxable sales. The 80% figure was based on merchandise sold and the coffee shop's on-premises consumption facilities. The corporation consented to the results of the prior audit. Petitioner was president of the corporation and was responsible for running the business at the time of the prior audit.

CONCLUSIONS OF LAW

A. On audit the corporation did not produce sales invoices, cash register tapes or any other records that would serve as a verifiable record of taxable sales. Under such circumstances, the Division properly estimated the corporation's sales (Tax Law § 1138[a][1]; ***Matter of Licata v. Chu***, 64 NY2d 873, 487 NYS2d 552). The audit methodology utilized by the Division to estimate sales must be reasonably calculated to reflect taxes due (***Matter of Markowitz v. State Tax Commission***, 54 AD2d 1023, 388 NYS2d 176, *affd*, NY2d 684, 405 NYS2d 454). In this

case, the audit method used the results of a prior audit of the same business. The Division's use of the results of a prior audit of the same business is a reasonable method of audit (*Matter of Burbacki*, Tax Appeals Tribunal, February 9, 1995). Accordingly, petitioner had the burden to establish by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (*Matter of A&J Gifts Shop v. Chu*, 145 AD2d 877, 536 NYS2d 209, *lv denied* 74 NY2d 603, 542).

B. Petitioner has failed to show error in either the audit method or results. Petitioner's argument that the business did not have the volume of sales indicated by the audit results fails because the starting point in the audit method was gross sales as reported by the corporation on its sales tax returns. If, in fact, the corporation's sales were lower than the audit indicates, then the corporation was overreporting its gross sales on both its sales tax returns and on its Federal income tax returns (*see*, Finding of Fact "5"). It seems highly unlikely that the corporation would overreport its sales over the entire two and one-half year audit period and, absent any documentation supporting this claim, I must reject it.

Petitioner also contended that the percentage of taxable sales of the business was lower than the 80% figure used on audit. The corporation, however, consented to this taxable percentage in the prior audit. Furthermore, of the items sold by the business only newspapers were nontaxable and petitioner has clearly failed to establish that newspaper sales accounted for more than 20 % of the corporation's gross sales. Petitioner thus has not shown that the 80% taxable percentage figure was in error.

Finally, petitioner contended that an observation test, with the auditor observing sales by the business for a period of time, would have produced a more accurate result. However, the Division is not limited or required to use a particular indirect audit method but instead is only

required, in the face of inadequate, unreliable or unavailable records, to use a reasonable method (*see, Matter of Markowitz v. State Tax Commission, supra*). Here, the corporation did not maintain guest checks or cash register tapes. Where, as in this case, a taxpayer's own failure to maintain adequate, accurate and complete books and records requires resort to indirect audit techniques, exactness is not required of the Division in arriving at its determination and the consequences of such record keeping failures weigh heavily against the taxpayer (*Matter of Meskouris Bros. V. Chu*, 139 AD2d 813, 526 NYS2d 679). Accordingly, petitioner's general assertion that more accurate audit methodologies could have been employed is both unpersuasive and unsupported on the facts of this case.

C. The petition of George Kanellopoulos is denied and the Notice of Determination dated February 22, 2000 is sustained .

DATED: Troy, New York
May 2, 2002

/s/ Timothy J. Alston
PRESIDING OFFICER